# CONFIRMATION ETHICS: PRESIDENT REAGAN'S NOMINEES TO THE UNITED STATES SUPREME COURT

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"I do not believe that as a nominee I can . . . endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again."

— Sandra Day O'Connor before the Senate Judiciary Committee, 1981

"*Griswold v. Connecticut* does not sustain its burden . . . ."

"*Roe v. Wade* contains almost no legal reasoning."

— Robert H. Bork before the same Committee, 1987

## I. INTRODUCTION

The confirmation hearings on the nomination of Robert Bork by President Reagan to the United States Supreme Court epitomized the modern trend toward expanded review of judicial nominees.[1] In 1987, Judge Bork testified before the Senate Judiciary Committee for thirty-five hours during five days,[2] answering nearly all of the Committee's pointed and specific questions. In so doing, he boldly went where no nominee had gone before, stating his opinions on controversial legal issues with clarity and force. Although other nominees set limits, Judge Bork simply spoke his mind. If we were to apply Justice O'Connor's principle of refusing to answer questions regarding past, present, or future legal issues that could again come before the Supreme Court on the ground that it would be improper,[3] it would seem that Judge Bork committed impropriety

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1. *See* Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

2. *See Hearings Before the Senate Comm. on the Judiciary on the Nomination of Robert H. Bork to be Assoc. Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 845 (1987) [hereinafter *Bork Hearings*].

3. At the outset of her testimony, Justice O'Connor advised the Senators that she

after impropriety during the course of his confirmation testimony. Who was right? Did Justice O'Connor articulate a standard to be emulated, or was she merely reluctant to answer difficult questions? Did Robert Bork simply cast aside an archaic taboo, or did he harm the integrity of the confirmation process?

Many have argued that the Senate should not place potential justices in such a difficult position, but rather it should review only a candidate's qualifications while avoiding the troubling and divisive issues of judicial philosophy and interpretation.[4] It seems more likely that close questioning will continue to be the norm, at least in potentially "transformative" situations.[5]

What is the nature and extent of a nominee's duty to provide the Senate with the information that it seeks? When questioned about personal beliefs, opinions, philosophy, and intent, most recent nominees to the Supreme Court have balked at answering at least some of the inquiries put to them,[6] generally on the ground that it would be "improper" to reply. This undifferentiated propriety argument has been severely criticized by Grover Rees[7] and others, but virtually all commentators agree that there are some ethical restraints on the scope of a Supreme Court nominee's comments during the course of Senate confirmation proceedings.

One fascinating aspect of this discussion is that it has been conducted as though there were absolutely no law on the subject. By and large, the nominees have abstained on the basis of their personal ethics and views of the judging process, while their critics have refuted the logic of their arguments. Notably absent from the entire discussion has been any consideration of

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would not respond to "how [she] might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again." *Hearings Before the Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor of Arizona to serve as an Assoc. Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. 57 (1981) [hereinafter *O'Connor Hearings*].

4. *See generally* Freund, *supra* note 1; Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

5. *See* Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983); Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

6. *See generally* Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109 (1987); Rees, *supra* note 5.

7. *See* Rees, *supra* note 5.

the American Bar Association *Model Code of Judicial Conduct*.[8] No nominee has invoked any section of the *Code of Judicial Conduct* to justify refraining from answering any question during oral testimony.[9] Neither has any senator attempted to use the *Code* as a device to persuade the recalcitrant nominee. It is essentially treated as if nonexistent in the literature on Supreme Court selection.[10] The *Code* may not be extremely illuminating in the area of Supreme Court selection, but when it comes to judicial impropriety it provides the only text we can apply.

One naturally hesitates to apply so commonplace a tool as the *Code of Judicial Conduct* to so weighty a process as selection of Supreme Court justices. It is obvious that the larger issues, such as the separation of powers and judicial independence, will dominate the interpretation of textual provisions that in the main apply to state court trial judges. Should constitutional interpretation and the *Code of Judicial Conduct* diverge on matters touching upon the appointment of Supreme Court justices,

8. MODEL CODE OF JUDICIAL CONDUCT (1972). The *Model Code of Judicial Conduct* has been adopted, in whole or in part, by every state except Montana, Rhode Island, and Wisconsin. It has also been adopted by the Judicial Conference of the United States and by the District of Columbia.

9. In response to a written question from Senator Humphrey, Justice O'Connor invoked Canon 3C as her basis for declining to answer. *O'Connor Hearings*, *supra* note 3, at 218.

The following references were also made to the *Code* during various hearings, although not in the context of a nominee's refusal to answer a question: Justice Kennedy was asked one question concerning the *Code*'s treatment of membership in discriminatory clubs. *See Hearings Before the Senate Comm. on the Judiciary on the Nomination of Anthony M. Kennedy to be Assoc. Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 195 (1988) [hereinafter *Kennedy Hearings*].

Chief Justice Rehnquist was asked to compare the *Code*'s disqualification requirements with those of 28 U.S.C. § 455. *See Hearings Before the Senate Comm. on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 99th Cong., 2d Sess. 231 (1986) [hereinafter *Rehnquist Hearings*]. Justice O'Connor, when asked if she based her concerns about possible disqualification on 28 U.S.C. § 455, included in her response a reference to Canon 3C. She also mentioned the "canons of judicial ethics" with reference to Justice Burger's campaign for prison reform and judiciary efficiency. *See O'Connor Hearings*, *supra* note 3, at 116, 140.

No other mention was made of the *Code of Judicial Conduct* during the testimony of Justices Scalia, O'Connor, Rehnquist, or Kennedy, or that of Judge Bork.

10. *See, e.g.*, Rees, *supra* note 5; Freund, *supra* note 1; Fein, *supra* note 4; Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988); Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559 (1988); Ackerman, *supra* note 5; Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970) (not mentioning then-existing Canons of Judicial Ethics). The sole exception appears to be Ross, *supra* note 6, at 113 & n.11, 124 & n.51 (cites the *Code* twice in passing); *see also* Chemerinsky, *Ideology, Judicial Selection, and Judicial Ethics*, 2 GEO. J. LEG. ETHICS 643 (1989); Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (discussing the *Code*'s limitations on "pledges and promises" in judicial campaigns).

there is no doubt which course must be followed. Still, there are reasons to look to the *Code* for guidance with regard to the permissible (or desirable) scope of a potential justice's responses during questioning before the Senate.

The *Code* is primarily a judges' document. The project of revising the earlier *Canons of Judicial Ethics*[11] was motivated by the events surrounding the rejection of Abe Fortas as Chief Justice of the United States Supreme Court.[12] Although the *Model Code* was not drafted exclusively by jurists, Chief Justice Roger Traynor of the California Supreme Court chaired the American Bar Association committee that developed it.[13] In more practical terms, the adoption of the *Code* has rested exclusively with judges. The highest courts of forty-seven states have each promulgated some version of the *Code of Judicial Conduct* as the "law of judging." Thus, the overwhelming majority of state jurists are subject to the *Code*'s disciplinary provisions and are guided by its prescriptive standards—not as a consequence of outside imposition, but rather as the result of adoption by the judiciary itself.

In the federal government, the *Code of Judicial Conduct* has been adopted by both the District of Columbia and the Judicial Conference of the United States.[14] The Judicial Conference was one of the earliest bodies to enact the *Code*, having first promulgated it in 1973,[15] less than a year after its approval by the American Bar Association House of Delegates.[16] Although this adoption cannot be said to be binding in the same sense that the adoption of the *Code* by a state supreme court is binding,[17] it is the most definitive statement that the federal judiciary can make regarding normative ethics for United States judges.[18]

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11. CANONS OF JUDICIAL ETHICS (1924).

12. *See* E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT (1973) [hereinafter E.W. THODE, REPORTER'S NOTES]; Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793 (1972) [hereinafter Thode, *The Development of the Code*].

13. *See* Thode, *The Development of the Code*, *supra* note 12.

14. *See* 69 F.R.D. 273 (1975).

15. *See id.*

16. *See* MODEL CODE OF JUDICIAL CONDUCT (1972).

17. *See* Edwards, *Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges*, 87 MICH. L. REV. 765 (1989) (discussing the disciplinary authority of circuit councils over federal judges).

18. The Judicial Conference does not possess either rulemaking authority or supervisory jurisdiction. The provisions of the *Code*, however, will doubtless inform the decisions of the various circuit councils as they invoke their limited disciplinary authority

The Judicial Conference is comprised of representatives from all levels of the federal judiciary except the Supreme Court.[19] Its warrant, including its version of the *Code of Judicial Conduct*, runs to "all judges of the United States courts of appeals, the Court of Claims, the Court of Customs and Patent Appeals, the United States district courts, and the Customs Court, and to all bankruptcy judges and United States magistrates."[20] In the strictest terms, the United States Supreme Court is the only federal court that stands outside the requirements of the *Code*. Moreover, by its own terms the *Code* applies only to sitting, not prospective, judges. Were one determined to ignore the *Code of Judicial Conduct*, one might argue that it is irrelevant to consider ethical rules that apply neither to nonjudge nominees nor to confirmed justices.

Such a formalist disregard for the *Code* would be inapt. First, notwithstanding its technical inapplicability to the Supreme Court, the *Code* stands as the broadest and most universally applicable statement available regarding judges' ethical aspirations for their own profession. It would hardly seem credible for nominees to excuse what would otherwise be clear ethical lapses on the ground that the rules did not reach them personally. Although it is conceivable that there could be constitutional or other reasons not to hold a prospective Supreme Court justice to the letter of the *Code*, at the very least the burden of showing why it should be disregarded ought to rest with the nominee. These are, after all, justices who are being confirmed.

Second, the *Code*'s provisions concerning judicial disqualification have been codified and are applicable to Supreme Court justices.[21] As I will develop further below, these disqualification rules must be considered regarding a nominee's response to questioning in the Senate.[22] Thus, in this central regard, the *Code*, as a matter of function, is relevant to potential Supreme Court justices.

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under the Judicial Councils Reform and Judicial Conduct and Disability Act, 28 U.S.C. §§ 331, 332, 372, 604 (1980). *See* Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982); Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45 (1988).

19. *See* 28 U.S.C. § 331 (1980).

20. 69 F.R.D. 273 (1975).

21. *See* 28 U.S.C. § 455.

22. *See infra* at Part V.

Finally, of the twelve most recent nominees to the Supreme Court, ten approached confirmation while holding positions that made the *Code of Judicial Conduct* specifically applicable to them. Justices Scalia, Stevens, Blackmun, Kennedy, and Chief Justice Burger all sat on United States Courts of Appeal when they were nominated. Justice O'Connor was a member of the Arizona Appellate Court. Similarly, Judges Bork, Ginsburg, Haynesworth, and Carswell all sat on lower federal courts when they were named. Because the *Code of Judicial Conduct* applies to judicial, quasi-judicial, and nonjudicial activities, all ten of the above nominees were definitely subject to various of its constraints throughout their confirmation proceedings. In fact, in the entire time since the publication of the *Model Code* by the American Bar Association, only two individuals who were not limited in their conduct by the provisions of the *Code* have faced confirmation to the Supreme Court. Justice Lewis Powell came to the Court directly from private practice. William Rehnquist was nominated as associate justice while serving as assistant attorney general and was elevated to chief justice while already a member of the Supreme Court.[23]

Any discussion of the nature of restrictions placed on a Supreme Court nominee's responses to questioning at confirmation hearings would therefore be incomplete without some consideration of the *Code*. The following sections attempt to provide that discussion.

## II. Issues and Fears

In recent years, the nominees themselves have responded in widely different fashion to inquiries from the Senate concerning their views of the law—ranging from Robert Bork's willingness to discuss legal issues at length and in detail[24] to Sandra Day O'Connor's virtual refusal to answer in any but the most general terms.[25] Although both approaches have been subjected to a fair share of criticism, there is relative agreement among nominees, senators, and commentators that, whatever their scope or nature, there must be some limitations on a po-

23. As noted above, the adoption of the *Code* by the Judicial Conference of the United States does not make it applicable to sitting Supreme Court Justices. *See supra* notes 19-20 and accompanying text.

24. *See Bork Hearings*, *supra* note 2, *passim*.

25. *See O'Connor Hearings*, *supra* note 3.

tential justice's answers. Even Judge Bork, the acknowledged paragon of expansiveness among recent nominees,[26] declined to answer questions on the constitutionality of certain affirmative action programs as well as the application of his theory of stare decisis to *Roe v. Wade*.[27]

Restrictions are necessary to avoid or minimize the following three potential harms: (1) actual adjudicative partiality; (2) apparent partiality; and (3) loss of public confidence. The first concern is that statements made in the course of confirmation might skew actual decisions. A justice may consciously or subconsciously feel compelled to decide cases in accord with her answers to the Senate Judiciary Committee, thus voting differently than might otherwise have been the case.[28] Even in the absence of actual partiality, it may seem to future litigants that a justice is bound to a predetermined outcome as a consequence of commitments apparently made during confirmation.[29] This appearance of partiality should be avoided in its own right. It may also be sufficient to suggest or even require recusal, thereby damaging the justice's ability to function as a member of the Court.[30] Finally, without regard to particular outcomes, the public may lose confidence in the Supreme Court as an institution if it appears that confirmation has been purchased through the pledge of future conduct in office.[31]

Nominees to the Supreme Court appear voluntarily before

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26. *See Bork Hearings*, *supra* note 2, at 239.

27. *See id.* at 261, 266; *id.* at 292 (referring to Roe v. Wade, 410 U.S. 113 (1973)).

28. Justice Scalia, for example, expressed the concern that he would impair his "ability to be impartial" by answering questions about past Supreme Court opinions and that he would be "prejudicing future litigants" by stating non-obvious views. *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Antonin Scalia to be Assoc. Justice of the Supreme Court of the United States*, 99th Cong., 2d Sess. 58, 87 (1986) [hereinafter *Scalia Hearings*].

29. Justice Scalia: "[N]obody arguing that case before me should think that he is arguing to somebody who has his mind made up either way." *Id.* at 38.

30. "Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter." *O'Connor Hearings*, *supra* note 3, at 58. Concerning this position as stated by Justice O'Connor, see Rees, *supra* note 5; Ross, *supra* note 6.

Justice Scalia stated it differently: "I think it is quite a thing [for a litigant] to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." *Scalia Hearings*, *supra* note 28, at 37.

31. Justice Scalia did not want "to be in a position of having, in connection, as a condition of [his] confirmation [given] . . . [a]n indication of how [he] would come out on it." *Scalia Hearings*, *supra* note 28, at 57.

the Senate Judiciary Committee. They are not subject to compulsory process and none has ever been compelled to answer any particular question.[32] A decision to refrain from answering, of course, carries with it the possibility of prompting a negative vote on confirmation, but the easy confirmation of the recalcitrant Justices O'Connor and Scalia make this risk seem ephemeral at best. How, then, should the nominee resolve the tension between answering questions and compromising the appearance of impartiality?

Although every justice-designate will ultimately have to arrive at her own solution to this problem, the issue is not one that can be left, as an analytical matter, to the individual's conscience. Each nominee ought to refrain from answering only where a principled reason can be articulated. Assume, for example, that Justices O'Connor and Scalia declined to answer questions solely as the result of introspection, without intending to suggest a normative rule. Could a nominee refuse a senator's inquiry on such a purely subjective basis? Consider the necessary rationale: "I know that once I make a public statement I will be unable to rethink or reconsider the issue. Perhaps others could continue to be open-minded, but I cannot." Certainly, such a nominee would have to abstain from answering, but any justice-designate possessed of such eggshell impartiality would be unsuitable to the bench on other grounds. A judge who could not remain subjectively open-minded following a public statement on the law also could not be trusted to re-examine her own published opinions. A nominee who declined to answer questions on individually subjective, non-normative grounds would seem to labor under a strong decisional disability.[33]

The search must be for a theory, if not a rule, of confirmation ethics. Here the *Code of Judicial Conduct* is instructive, particularly because virtually every sitting judge who is nominated to the high court will be bound, at least as a formal matter, to the requirements of the *Code*.[34] In the balance of this article I will delineate the manner in which specific *Code* sections address the nature of a nominee's statements in the course of the confirma-

32. *See* Freund, *supra* note 1.

33. Neither Justice O'Connor nor Justice Scalia overtly staked out this position, and their subsequent opinions belie any such juridic fragility.

34. *See supra* note 8 and accompanying text; *supra* p. 234.

tion process, particularly as the *Code* regards the problems of actual prejudgment, apparent partiality, and public confidence. My analysis is that the *Code*, while definitely applicable to judicial confirmation hearings, imposes surprisingly few restraints on the scope of a nominee's responses. The *Code* allows Judge Bork's approach, and it gives no support to Justice O'Connor's restricted view.

## III. Adjudicative Partiality and Prejudgment

One frequently articulated objection to specific questions from senators is that specific answers might bind the nominee once seated on the Court. In other words, it is argued that potential justices must refrain from stating their views because a previous public statement may so fix those views as to create closed-minded judging in the future.[35] A weaker version of the same position would be that it threatens a judge's impartiality to require the public statement of a legal opinion at a time when the judge has not had the opportunity to consider the matter fully in a judicial context. In either case, the relationship between speech and actual impartiality is addressed by the *Code* under the heading of "Adjudicative Responsibilities."[36]

Although no precise definition of the term "impartiality" may be possible, I believe there is a fair consensus that it means something other than the complete absence of pre-existing opinion.[37] Litigants are not guaranteed the right to lay their cases on a *tabula rasa*, nor does impartiality require that we appoint judges who, in Mark Twain's words, are virtuously able to "swear to their own ignorance."[38] Rather, the core of any concept of judicial impartiality is the ability to be persuaded. A judge must be intellectually receptive to the facts and arguments that are presented in any particular case and must be

35. Justice O'Connor worried that to express an opinion "would mean that I have prejudged the matter . . . ." *O'Connor Hearings*, *supra* note 3, at 58.

36. *See* Model Code of Judicial Conduct Canon 3A (1972).

37. *See* Laird v. Tatum, 490 U.S. 824 (1972) (opinion of Rehnquist, J.) (denying motion for recusal).

38. Mark Twain, Roughing It 783 (Library of America ed., 1984). Mark Twain was referring to the process of jury selection, but his readers will not doubt that he would have viewed the selection of judges with similar skepticism. His specific reportorial concern was drawn in the trial of a highly celebrated Nevada murder case. Following voir dire, and to the reporter's chagrin, a jury was empaneled composed only of those "who swore they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the very cattle in the corrals . . . and the stones in the streets were cognizant of." *Id.*

willing to delay judgment until the conclusion of the matter. A judge may have pre-existing views but should not be bound by them. With this understanding, how might statements in the course of a confirmation hearing affect a judge's actual impartiality?

Canon 3 of the *Code* requires generally that a judge "Perform the Duties of His Office Impartially."[39] Canon 3A, titled "Adjudicative Responsibilities," provides, in that connection, that a judge shall "neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding,"[40] and that a "judge should abstain from public comment about a pending or impending proceeding in any court."[41] Thus, the impartial performance of adjudicative responsibilities requires that a judge avoid certain public statements about legal matters, presumably including statements solicited during Senate confirmation hearings. But exactly what statements?

The Canon on adjudicative impartiality notably does not preclude a judge from engaging in general discussion of legal issues.[42] It forbids only comments concerning "pending or impending proceedings," and it contains no language that would appear to apply outside of that context. The *Code* itself does not define the term "proceeding," but it is defined in the closely analogous federal disqualification statute as comprising "pretrial, trial, appellate review, or other stages of litigation."[43] In other words, a "proceeding" upon which a judge must not comment must be a case that is actually in some stage of litigation. An "impending proceeding," by inference, must be an actual controversy that is poised for litigation.[44]

The relationship between this restriction and adjudicative impartiality should be clear. A judge who comments on an ac-

39. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

40. *Id.* at Canon 3A(4).

41. *Id.* at Canon 3A(6).

42. The question of general discussion of the law is further addressed by Canon 4. *See infra* notes 88-90 and accompanying text.

43. 28 U.S.C. § 455 was drafted to codify Canon 3C of the Model Code. *See* S. REP. No. 419, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351. To interpret Canon 3, at least within the context of the federal system, it seems appropriate therefore to look at the definition provisions of section 455.

44. "Impend: To be about to happen, to be near at hand, to be imminent." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1983). Recall that it is a proceeding that must impend to trigger Canon 3C. *See also* E.W. THODE, REPORTER'S NOTES, *supra* note 12, at 54 ("requirement of concreteness implicit" in " 'impending proceeding' ").

tual matter in controversy is making a statement about how the law applies to a fixed set of facts or circumstances. In other words, the judge is judging—something that should only be done in court and at the end of an entire case. Virtually all recent Supreme Court nominees have declined to respond to questions concerning pending cases. Justice Kennedy would not answer questions about a death penalty case because it was still pending in his court on remand.[45] Judge Bork took the same view,[46] as did Justices Rehnquist[47] and O'Connor.[48] Justice Scalia declined to answer questions about the removal of authority from the Federal Trade Commission because that very case was pending in his court.[49]

Comments on the law that are not made in the context of a pending proceeding are not as dangerous as comments on actual cases because they do not apply the law to any particular facts. In the words of Robert Bork:

> I am willing to engage in an abstract discussion of large principles and generic classes and so forth. However, when you are a judge, the cases do not come to you that way. They come in gray areas with difficult facts, and so forth. So I think this discussion is useful but it by no means is the way a judge goes about his business.[50]

Judge Bork was correct; general comments do not trench upon a judge's business. Abstract statements about the law do not prejudge because they do not reach factual conclusions. They may state pre-existing opinions, but they do not apply them to any determinate circumstances, events, or litigants. Consequently, they do not threaten adjudicative impartiality. That is why the prohibitions of Canon 3 should apply only to cases and not to general propositions of law, legal philosophy, or similar discussion.[51]

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45. *See Kennedy Hearings*, *supra* note 9, at 115.

46. *See Bork Hearings*, *supra* note 2, at 343 (cautioned not to comment on "congressional standing" issue then pending before Supreme Court); *id.* at 831 (would not discuss standing because case was then before federal district court).

47. *See Rehnquist Hearings*, *supra* note 9, at 188, 320, 349 (would not comment on constitutionality of bills pending in Congress).

48. *See O'Connor Hearings*, *supra* note 3, at 129 (would not give opinion on preventive detention because certiorari petition had been filed); *id.* at 133 (declined to answer question on tax exemption for discriminatory schools because cases were before Supreme Court).

49. *See Scalia Hearings*, *supra* note 28, at 39, 50.

50. *Bork Hearings*, *supra* note 2, at 179.

51. *See* E.W. THODE, REPORTER'S NOTES, *supra* note 12, at 54 (general legal discussions are authorized by Canon 4, not prohibited by Canon 3).

Is this a meaningful distinction? Cannot statements of general principle or belief indicate by proxy how a judge intends to decide a particular case?[52] Is not the definition of a "pending or impending" proceeding so vague as to preclude clear guidance? What, then, would be the point of interpreting a rule to allow one sort of comment while prohibiting the other?

This posited lack of functional distinction between concrete cases and inchoate philosophy is frequently articulated as a concern about the proper role of the Senate vis-a-vis the judiciary.[53] Although highly abstract discussion may be permissible—"I am in favor of civil rights"—it must stop far short of suggesting a probable voting pattern. Because the legislature should not shape judicial opinions, nominees should not even intimate to the Senate how they might decide an issue that might come before the Supreme Court.[54] Under this analysis there is no difference between a likely issue and an actual case; neither may be remarked upon.[55]

The difficulty, of course, is that "might come before the Supreme Court" is an elastic standard that arguably encompasses all human activity. Any comment more serious than the merest platitude would be prohibited. There would be no possibility of interchange between the nominee and the Senate because the nominee would be unable even to restate the factual holdings of well settled cases—they might, after all, return to the court in the future. As an extreme example, Justice Scalia avoided questions regarding the vitality of judicial review: "If somebody wants to come in and challenge *Marbury v. Madison*, I will listen to that person."[56] The structure of the "advice and consent" function, and the very willingness of nominees to appear before the Senate Judiciary Committee, tells us that there is a distinction between matters that are truly likely to be decided by the Supreme Court and speculation about hypotheti-

52. Justice O'Connor took this position, stating that to express an opinion on an "issue" would mean that she had "prejudged the matter or ha[d] morally committed [her]self to a certain position." *O'Connor Hearings*, *supra* note 3, at 58.

53. *See* Ross, *supra* note 6.

54. *See* Rees, *supra* note 5.

55. Justice Scalia, for example, would not comment as to whether there was a consensus on the Court regarding affirmative action because "[t]here is doubtless going to be a lot more litigation in that field." *Scalia Hearings*, *supra* note 28, at 45.

56. *Scalia Hearings*, *supra* note 28, at 33, 83-84 (referring to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). Other nominees, however, were not so squeamish about reaffirming *Marbury* and judicial review. *See, e.g.*, *Kennedy Hearings*, *supra* note 9, at 93; *Bork Hearings*, *supra* note 2, at 713-14.

cal future cases. In this light, a restriction against discussing matters that are currently in some stage of litigation—pending proceedings—seems clear enough. In those cases, records have been established and issues have been joined. Any comment in such circumstances by a potential Supreme Court justice will unavoidably amount to a premature judgment.

At the other end of the spectrum, there are statements of opinion that undoubtedly do not reflect upon pending or impending proceedings. A judge who expresses a belief in "originalist" interpretation of the Constitution, for example, or in the general utility of "law and economics" analysis, says virtually nothing about any concrete dispute. It is true that a listener might arrive at certain inferences about the judge's future behavior based upon a statement of philosophy, but it is equally true that the judge has made no commitment as to how the law will apply to any certain set of facts.[57]

The truly perplexing cases lie midway in this continuum; they are the cases that, in Justice O'Connor's words, "may come before the Court."[58] The *Code of Judicial Conduct* speaks in terms of "impending" cases.[59] Whichever term is used, further definition is necessary. When is a matter sufficiently likely to arise as to be "impending?" As candidates for appointment, Justices O'Connor[60] and Scalia[61] took the position that virtually all legal issues may eventually be heard by the Supreme Court and that no nominee should express any view on most questions of law. Justice O'Connor explained that she could neither "endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again," nor could

57. For example, Judge Bork freely discussed his views on constitutional interpretation. *See Bork Hearings*, *supra* note 2 at 103, 115, 119, 131, and *passim*. Justice Kennedy answered questions concerning the intent of the Ninth Amendment, the meaning of the term "liberty," and the scope of the First Amendment. *See Kennedy Hearings*, *supra* note 9, at 87, 88, 111, 119. Justice Rehnquist, a sitting justice at the time of the hearings to confirm his appointment as Chief Justice, answered questions on the application of stare decisis and the allocation of authority between the federal government and the States. *See Rehnquist Hearings*, *supra* note 9, at 227, 270-271.

58. *O'Connor Hearings*, *supra* note 3, at 57, 58. For example, Justice O'Connor declined to give her general views on the exclusionary rule, *see id.* at 80; affirmative action, *see id.* at 84; the potential scope of a constitutional convention, *see id.* at 70; or the ability of Congress to limit the jurisdiction of the federal courts, *see id.* at 71.

59. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3A (1972).

60. *See O'Connor Hearings*, *supra* note 3, at 57-58.

61. Justice Scalia refused to answer questions concerning post-trial review of death sentences, *see Scalia Hearings*, *supra* note 28, at 35; affirmative action, *see id.* at 45; sex discrimination under the Fourteenth Amendment, *see id.* at 57; or the right to privacy, *see id.* at 102.

she make a statement "as to how [she] might resolve a particular issue."[62] Other nominees asserted variations on the same theme with greater or less vigor.[63] Interpreted in terms of the *Code*, they may be understood to say that all such legal questions are "impending" before the Supreme Court.

This position is untenable. Carried to its conclusion, this rule would prevent nominees from responding to all law-based questions, including such softballs as "Are you committed to equality before the law?"[64] A prospective justice could not reaffirm settled precedent—say, *Brown v. Board of Education*[65]—because it is almost certain that someday some litigant will again raise the issue, if only in an otherwise frivolous petition for certiorari.[66] Indeed, under this theory a nominee should not even explain or recount past decisions of the Court, as Justice O'Connor often did, because the meaning or applicability of virtually any opinion might easily be the subject of future litigation.[67]

Of course, neither Justice Scalia nor Justice O'Connor meant literally what they said. Both answered numerous questions about the law without apparent fear of fouling the ethical line.[68] Neither clarified a method for determining which issues

62. *O'Connor Hearings*, *supra* note 3, at 57-58.

63. *See Rehnquist Hearings*, *supra* note 9, at 132, 168, 178; *Kennedy Hearings*, *supra* note 9, at 92, 136, 164, 228; *Bork Hearings*, *supra* note 2, at 261.

64. *See e.g.*, *Kennedy Hearings*, *supra* note 9, at 102 (regarding his support for civil rights, nominee stated, "You are entitled to that assurance"); *id.* at 1012 ("Well, Senator, at the outset, it is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights.").

65. 347 U.S. 483 (1954).

66. Justice O'Connor, however, did voice her agreement with *Brown*. *See O'Connor Hearings*, *supra* note 3, at 66-67. Contrast Judge Scalia: "[T]he only way to be sure that I am not impairing my ability to be impartial . . . is simply to respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right, or wrong." *Scalia Hearings*, *supra* note 28, at 58.

67. Justice O'Connor frequently answered questions by stating the holdings of decided cases. *See, e.g.*, *O'Connor Hearings*, *supra* note 3, at 71, 82, 85, 96. Is it not possible, however, that a future litigant could question those cases?

68. Justice O'Connor gave the senators her opinions on affording finality to state court decisions, *see O'Connor Hearings*, *supra* note 3, at 73; the desirability of a fee-shifting statute, *see id.* at 74; school desegregation, *see id.* at 78; the over-use of the Civil Rights Act, *see id.* at 91-92; aspects of the suppression of evidence, *see id.* at 93, 96, 101; the doctrine of preemption, *see id.* at 86; the death penalty, *see id.* at 128; the doctrine of prior restraint, *see id.* at 144; and the "intent" requirement in employment discrimination cases, *see id.* at 148. In at least the last of these areas, the issue upon which Justice O'Connor commented did indeed subsequently come before the Supreme Court. *See* Wards Cove Packing v. Atonio, 109 S. Ct. 2115 (1989).

Justice Scalia expounded at length on the judicial treatment of legislative history and committee reports. *See Scalia Hearings*, *supra* note 28, at 65-67, 106-07. He also answered questions on congressional authority over the intelligence community, *see id.* at

were sufficiently likely to come before the Court as to require declination, but they each stated positions that obviously stand in sharp contrast to the practice of other nominees. Judge Bork, of course, explained at length his views on the right to privacy, and he reiterated his frequent criticism of *Griswold v. Connecticut*[69] and *Roe v. Wade*.[70] He also gave examples of cases that he would not overrule,[71] and he explained that he accepted—but would not extend—the holding in *Shelley v. Kraemer*.[72] Judge Bork was not alone in his willingness to discuss legal issues. Justice Kennedy took up the question of the right to privacy, testifying that "liberty includes protection of a value that we call privacy."[73] It is certain that the scope, if not the existence, of the right to privacy will figure constantly in future federal court decisions. The same is true of other topics discussed without hesitance by Judge Bork and Justice Kennedy, and even of issues addressed by Justices Scalia and O'Connor. How, then, can impending proceedings be identified?

In my view, pure questions of law, even those likely to be considered by the court, are never "impending." Because only cases and controversies can actually be heard, only cases and controversies may "impend." Abstract issues, even critical ones, lack the justiciable characteristics of a case until they are embodied in a real factual dispute. Thus, an impending case is one that can be identified in some palpable manner as a dispute between recognizable parties over identifiable facts and circumstances.[74] Such a dispute may be termed an impending proceeding, whether or not it has been filed, and no judge should comment on its merits.[75]

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74; the Freedom of Information Act, *see id.* at 71; and the coherence of the Supreme Court's church-state jurisprudence, *see id.* at 97.

69. 381 U.S. 479 (1965).

70. 410 U.S. 113 (1973); *see Bork Hearings*, *supra* note 2, at 114, 116-17, 150, 186-87, 242.

71. *See Bork Hearings*, *supra* note 2 at 130.

72. 334 U.S. 1 (1948); *see Bork Hearings*, *supra* note 2, at 157. Similar examples abound throughout Judge Bork's testimony. *See, e.g.*, *id.* at 156 (agreed with Baker v. Carr, 369 U.S. 186 (1962)); *id.* at 273, 274 (supported Brandenburg v. Ohio, 395 U.S. 444 (1969)); *id.* at 288 (criticized, and ultimately accepted, Bolling v. Sharpe, 349 U.S. 294 (1955)).

73. *Kennedy Hearings*, *supra* note 9, at 88.

74. The draftees of the *Code* included the "impending proceeding" limitation "to preclude forum shopping by a party or lawyer who tries before the claim is filed to obtain some idea about how the judge would rule on the *particular fact* situation." Thus, it was their intention that it be limited to matters truly poised for litigation. E.W. THODE, REPORTER'S NOTES, *supra* note 12, at 54 (emphasis added).

75. Chief Justice Rehnquist would not answer questions regarding the constitution-

To illustrate, Judge Bork testified at some length as to his approach to the Equal Protection Clause,[76] explaining his "reasonable basis" methodology.[77] He clearly committed himself *not* to use tiers of scrutiny in determining discrimination cases.[78] Because discrimination cases inescapably will continue to be heard by the Supreme Court,[79] Judge Bork's comments were directed to "issues" that might come before the Court. Indeed, as both the nominee and senators recognized, a justice's overriding analysis may have a more enduring impact than the decision in any particular case. Nonetheless, Judge Bork committed no impropriety. He did not apply his reasonable basis test to any precise controversy. He did not pre-judge any facts, predetermine any outcomes, or prejudice any identifiable litigants. Thus, Judge Bork's discussion of the Equal Protection Clause involved no impending proceedings.

In contrast, Judge Bork was also asked to apply his theory of stare decisis to *Roe v. Wade*.[80] Here he drew the line. Completely willing to discuss stare decisis as a general matter, Judge Bork recognized that discussing the same issues in such a sharply defined context could well amount to prejudging an actual case.[81] Although even this sort of case-specific theorizing may yet lack some of the indicia of a palpable controversy, we may surely conclude that short of this level of concreteness, the restrictions of Canon 3A should not prevent a nominee from discussing her views of the law.

This conclusion follows from the very nature of the adjudicatory process, at least as it exists in the federal courts. Article III limits justiciability to "cases and controversies,"[82] and disallows advisory opinions. Settling concrete disputes is the judge's job; abstract speculation is not. In turn, the absolute restriction on "pending or impending" commentary is in-

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ality of specific litigation. *See Rehnquist Hearings*, *supra* note 9, at 188, 320, 349. Actual legislation, sure or likely to be challenged, may be considered impending because the facial validity of the statute may be all that will be at issue. *Accord Bork Hearings*, *supra* note 2, at 119, 256, 317, 330.

76. U.S. CONST. amend. XIV, § 1.

77. *See Bork Hearings*, *supra* note 2, at 119, 256, 317, 330.

78. *See id.* at 396.

79. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989).

80. *See Bork Hearings*, *supra* note 2, at 292 (referring to Roe v. Wade, 410 U.S. 113 (1973)).

81. *See id.*

82. U.S. CONST. art. III, § 2.

tended to restrain off-the-bench judging. Thus, the nominee may not discuss precisely those things that judges do.[83] Conversely, the nominee may discuss exactly, at least within the terms of Canon 3, those things that judges cannot do. Such answers should do no damage to adjudicative impartiality. During his confirmation testimony, Judge Bork paraphrased a speech given in Congress by Chief Justice John Marshall: "He said courts are there to decide controversies when an individual or an organization has been hurt. And it has to be the individual who has standing and not the issue involved which gives standing."[84] In other words, until an individual or organization has been aggrieved and can be identified, no issue can come before the federal courts. Consequently, issues, as opposed to cases, may not impend.

## IV. The Appearance of Partiality, Part One: The Capacity to be Fair

Canon 3 imposes an absolute ban on the discussion of the relatively narrow category of pending or impending proceedings. Regarding comments that fall outside this structure, might certain statements nonetheless *appear* improper? Accepting my position that the expression of one's views or philosophy will not actually affect the fairness of future judging, will not the nominee's statements of opinion at least give the impression of an intent to vote in like manner once a comparable controversy is presented to the Court? This concern was raised by Justice Scalia, who went so far as to decline comment on *Marbury v. Madison*, lest some future litigant doubt his open-mindedness on the constitutionality of judicial review.[85]

It must be recognized, however, that no system can control for all conceivable appearances of partiality. The human capacity for suspicion being boundless, there are probably no facts about a sitting or potential judge that might not cause some appearance of partiality to someone. Virtually every answer by every nominee may be interpreted as suggesting a possible future ruling. Indeed, even a commitment to open-mindedness

83. *See Bork Hearings*, *supra* note 2, at 179 (cases before judges involve "gray areas with difficult facts," not generic issues).

84. *Id.* at 406.

85. *See Scalia Hearings*, *supra* note 28, at 33, 37-38 (referring to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

may be seen as prejudicial to parties seeking to maintain the finality of an established precedent.[86] Thus, we must be concerned only with the reasonable or cognizable appearance of partiality. The *Code of Judicial Conduct* makes this explicit.[87]

Canon 4 governs what the *Code* refers to as "quasi-judicial" activities. Under this heading it provides that a judge may "speak, write, lecture, teach, and participate in other activities concerning the law,"[88] and it provides that a judge may "appear at a public hearing before an executive or legislative body or official on matters concerning the law."[89] Read in combination, these provisions recognize and endorse the recent nominees' practice of making themselves available to the Senate Judiciary Committee. They have appeared before a legislative body to speak about the law.

The *Code* imposes a single substantive limitation on this activity. The testifying judge must not "cast doubt upon his capacity to decide impartially any issue that may come before him."[90] This restriction is clearly distinct from the "pending-impending" rule in at least two regards. The limitation runs to "issues" rather than "proceedings," and the judge may "speak on the law" so long as it does not "cast doubt" upon the capacity to decide matters impartially. Thus, while Canon 3 completely prohibits all discussion of a narrow range of proceedings without regard to actual partiality, Canon 4 applies more broadly but allows some discussion of the issues to which it applies. Assuming that the definition of impartiality remains constant, this restriction can only be applied once we have given some meaning to a judge's "capacity to decide."

Because impartiality does not depend upon a complete absence of expressed views,[91] a statement of opinion would not be sufficient to destroy a judge's capacity to be open-minded[92];

86. Justice O'Connor, for example, signalled her open-mindedness about Roe v. Wade, 410 U.S. 113 (1973), stating in her testimony that legislators were constrained by that decision "while it remains on the books." *O'Connor Hearings*, *supra* note 3, at 125. This large hint no doubt alarmed supporters of abortion rights concerning her intentions.

87. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972). The federal statute controlling judicial disqualification is in accord, 28 U.S.C. § 455(a). Both require recusal only where the judge's impartiality might "reasonably" be questioned.

88. MODEL CODE OF JUDICIAL CONDUCT Canon 4A (1972).

89. *Id.* at Canon 4B.

90. *Id.*

91. *See supra* notes 37-38 and accompanying text.

92. The drafters of the *Code* intended this result: "[A] judge may write or lecture on a

nor should a doubt based upon such a statement be reasonable or cognizable under this rule. One hopes this point is obvious. If any prior expression of views on a legal issue could incapacitate a judge, then the qualification would swallow the rule. There would be no point in allowing judges to appear and speak concerning the law, when, as every law student learns during the first week of class, it is impossible to do so without stating some sort of premise or opinion.

Moreover, under such a strict approach to impartiality, there would be no reason to distinguish quasi-judicial statements from prior writings or even from past judicial opinions.[93] If the statement of a view on a legal "issue" results in partiality, then neither the date nor the forum of the statement should make any difference. Judges would therefore be eliminated from consideration on the basis of their old law review articles or last term's decisions.[94] The Bork case would have been extraordinarily easy to resolve because he had made a brilliant career of writing and speaking on issues that might "come before" the court. No responsible critic of Judge Bork suggested that the mere existence of his written record damaged his capacity to decide issues impartially. It was the content, not the fact, of his writings that fueled the opposition.[95] We must conclude that quasi-judicial statements about the law, without more, are insufficient to cast doubt upon a judge's capacity to decide issues impartially.[96] What extra quality of a statement or answer would be sufficient to create the necessary doubt?

A judge's statements or a nominee's answers before the Senate Judiciary Committee would violate Canon 4 only when they evinced a settled intention to decide certain cases in a certain

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legal issue, analyzing the present law and its history, its virtues and its shortcomings; he may commend the present law or propose legal reform without compromising his capacity to decide impartially the very issue on which he has spoken or written." E.W. THODE, REPORTER'S NOTES, *supra* note 12, at 74.

93. *See* Laird v. Tatum, 409 U.S. 824, 901 (1972); *see also*, Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 694 (1973).

94. Justices Scalia and O'Connor, however, did not see their prior writings as a problem, and, in fact, they were quite willing to discuss them at the hearings. *See O'Connor Hearings*, *supra* note 3, at 136-37, 172-73; *Scalia Hearings*, *supra* note 28, at 40, 87, 95.

95. *See* Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 565-80 (1988); Chemerinsky, *Ideology, Judicial Selection, and Judicial Ethics*, 2 GEO J. LEG. ETHICS 643, 646 (1989).

96. E.W. THODE, REPORTER'S NOTES, *supra* note 12, at 74.

manner.[97] A judge would cast doubt on her capacity to be impartial by promising to reach a predetermined outcome irrespective of the arguments of the parties or the discreet facts of the presented case.[98] The capacity for impartiality requires being open both to persuasion and factual nuance.[99] Thus, a judge or nominee who forswears such individualized decisionmaking also denies the very process of common-law judging. Even though the judge might bend over backwards later to be fair, we may reasonably doubt the capacity to do so. Neither judges nor nominees should ever commit themselves to a decided course of legal action.

The confines of Canon 4 can be demonstrated in the context of *Roe v. Wade*.[100] Every person familiar with the case is likely to have an opinion on the acceptability of Justice Blackmun's argument. That a nominee holds such a view, or even articulates it, however, does not mean that it will dictate the outcome of other cases raising similar issues. Even a judge who is unalterably opposed to a constitutional right to abortion would have to consider the facts, issues, and arguments of the subsequent case. *Roe v. Wade* itself may be overruled, but the original case is not open to redetermination. No justice will be asked to write

97. Recent nominees to the Supreme Court have all disclaimed just this intention. *See, e.g., Kennedy Hearings, supra* note 9, at 89, 90; *O'Connor Hearings, supra* note 3, at 57; *Scalia Hearings, supra* note 28, at 37, 53; *Bork Hearings, supra* note 2, at 180-81.

98. Interestingly, Justice Scalia committed himself to one predetermined outcome during his confirmation hearings, when he stated that he would definitely recuse himself in a case that was on the Court's calendar for the next term. "I feel uncertain enough about it that I do not think I ought to go near it." *Scalia Hearings, supra* note 28, at 73. Because it is conceivable that one of the litigants in that case might have wanted Justice Scalia to sit, one wonders why he did not at least explain his departure from the strict "no comment" rule. Judge Bork and Justice Kennedy also apparently felt free to announce whether or not they would disqualify themselves in certain matters, even though recusal is clearly a judicial act. *See Bork Hearings, supra* note 2, at 416; *Kennedy Hearings, supra* note 9, at 217.

99. Justice O'Connor recognized as much: "[N]either you nor I know today the precise way in which any issue will present itself in the future, or what the facts or arguments may be at that time, or how the statute being interpreted may read. Until those crucial factors become known, I suggest that none of us really knows how we would resolve any particular issue." *O'Connor Hearings, supra* note 3, at 58.

100. 410 U.S. 113 (1973). The future of *Roe v. Wade* was a near-constant subtext at both the O'Connor and Scalia hearings. Neither would state a view on the correctness of the decision. *See O'Connor Hearings, supra* note 3, at 107, 108, 126; *Scalia Hearings, supra* note 28, at 37. Judge Bork was far less recalcitrant, flatly rejecting the concept of the right to privacy, upon which *Roe v. Wade* is based. *See Bork Hearings, supra* note 2, at 114-17, 119, 150. He was sharply critical of the decision in *Roe*, stating that it "contains almost no legal reasoning." *Id.* at 184. In disclaiming an intention to overrule *Roe*, he indicated the factors that he would consider in deciding whether or not to uphold it. *See id.* at 184-87.

a new *Roe* opinion as a substitute for Justice Blackmun's product. Constitutional adjudication is not duplicate bridge. Rather, the moral and philosophical issue of abortion must be faced in the context of wholly new facts and law.

An abortion case can only come before a court when a state legislature has enacted a statute that somehow restricts abortion. Furthermore, the institution of a lawsuit will require either that the statute has been enforced against a party or that a party has sought to enjoin it. Before any question of a constitutional right to abortion may even be addressed, the court will have to consider a host of other legal issues such as standing, ripeness, mootness, vagueness, and overbreadth. Additionally, the parties may bring arguments or establish facts that were never considered by any previous court.[101] Thus, in the absence of a statement of inflexible intention, a future justice's disagreement with *Roe v. Wade* would not imply an incapacity to be impartial in the future. The judge would still be open to persuasion by the parties based upon the nuances and discrete circumstances that will always attend each new case.[102]

Judge Bork endeavored to walk precisely this line. While making no secret that he held a presumption against the reasoning of the original opinion in *Roe v. Wade*,[103] he delineated the manner in which he would consider a similar case and the factors that he would consider in reaching a decision.[104] He could not, he testified, know how he would vote in an actual

101. *See* Webster v. Reproductive Services, 109 S. Ct. 3040, 3047 (1989) (O'Connor, J., concurring) (raising for the first time, without deciding, the questions of the inseparability of abortion from in vitro fertilization procedures, as well as from certain forms of birth control, including the use of intra-uterine devices).

102. *See* E.W. THODE, REPORTER'S NOTES, *supra* note 12, contains the following example:

> There is a significant difference between the statement, "I will grant all divorce actions that come before me—whatever the strength of the evidence to support the statutory ground for divorce—because I believe that persons who no longer live in harmony should be divorced," and the statement, "I believe that limited statutory grounds for divorce are not in the public interest. The law should be changed to allow persons who no longer may be in harmony to obtain a divorce."

*Id.* at 74.

103. *See Bork Hearings*, *supra* note 2, at 184 ("contains almost no legal reasoning"); *id.* 186 ("comes out of no legitimate constitutional materials").

104. Judge Bork:

> I would first ask the lawyer who wants to support the right, "Can you derive a right of privacy, not to be found in one of the specific amendments, in some principled fashion from the Constitution so I know not only where you got it, but what it covers?
>
> If he could not do that, I would say, "Well, if you can't derive a general right

case until he had read the briefs and heard the arguments.[105]

Some observers, no doubt, regarded this exercise as only a subterfuge, masking Judge Bork's hidden intentions. Such an interpretation, however, would be unduly harsh and unfair. Judge Bork's testimony had all the indicia of intellectual honesty. Judge Bork made no effort to hide the fact that *Roe v. Wade* faced an uphill struggle in his jurisprudence, and he did not back away from this position. Rather, he explained the factors that could lead him, as a common-law judge, nonetheless to affirm the decision. It cannot be that Judge Bork was dishonest in this regard because the factors he listed were narrowly circumscribed. A deliberate deception would have made greater concessions. Rather, Judge Bork can be understood as explaining forthrightly how, notwithstanding his developed views, he retained the "capacity to decide impartially" the issues involved.

This is a sharp contrast to Justice O'Connor's response. When asked about her judicial philosophy concerning *Roe v. Wade*, she declined all comment on the opinion, stating, "I feel it is improper for me to endorse or criticize that decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts."[106] Justice O'Connor gave far less information to the Judiciary Committee than did Judge Bork, and it surely was her prerogative to do so. But does Judge Bork's explanation leave us with greater doubts as to his capacity for impartiality than does Justice O'Connor's abstention? Judge Bork confessed his inclination. He had obviously devoted time and thought to the manner in which a judge could hear and decide a case impartially in spite of his pre-existing "cast of mind,"[107] and he shared his analysis with the senators. Justice O'Connor simply kept her own counsel, leaving the Committee to wonder

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of privacy, can you derive a right to an abortion, or at least a limitation on anti-abortion statutes legitimately from the Constitution?

If after argument, that didn't sound like it was going to be a viable theory, I would say to him, "I would like you to argue whether this is the kind of case that should not be overruled."

So I would listen to that argument.

*Bork Hearings*, *supra* note 2, at 185.

105. *See id.*

106. *O'Connor Hearings*, *supra* note 3, at 108.

107. *See* Rehnquist, *supra* note 93; *see also*, LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES (1984).

what conclusions she had drawn from the "good deal of reading" that she said she had done on the subject.[108]

Both types of response are permitted by the *Code*. Silence, even if not required, is clearly a safe course that can seldom cast doubt on one's impartiality.[109] Nor does the candid confrontation of one's own baseline thinking incapacitate a nominee. If that were the case, then Justice O'Connor's personal statement that abortion is "repugnant"[110] should also call into question her ability to be fair and impartial, at least until she explained like Judge Bork how she would go about deciding a case without regard to her personal views.

Only actual commitments to specified outcomes violate the *Code of Judicial Conduct*. Unlike Judge Bork's thoughtful disquisition, a firm promise to reverse, or affirm, *Roe v. Wade* would destroy the ability to be fair. In essence, such a pledge would amount to a fixed commitment to vote against, or in favor of, the right to abortion, "no matter what." Consider the implications of a promise to reach a predetermined outcome in abortion cases without regard to the particulars of a specific lawsuit:

> "I will vote to enjoin the enforcement of any anti-abortion statute, *no matter what*, even if the plaintiff lacks standing or capacity to sue."
>
> "I will vote to uphold any anti-abortion statute, *no matter what*, even if it imposes penalties that violate the cruel and unusual punishment clause."
>
> "I will never vote to restrict access to abortions, *no matter what*, even in the face of new evidence on viability."
>
> "I will always vote to punish abortionists, *no matter what*, even if the case involves an unlawful search or a coerced confession."

These examples are not far-fetched. Every abortion case that reaches the Supreme Court will necessarily involve a new statute with its own set of restrictions and a scheme of enforcement. If the law is challenged prior to its enforcement, the Court will have to consider the entire range of civil procedure

108. *O'Connor Hearings*, *supra* note 3, at 107.

109. Selective silence, however, may be telling. Justice O'Connor was silent on *Roe v. Wade*, but she testified that she accepted Baker v. Carr, 369 U.S. 186 (1962), and a number of other Supreme Court decisions. *See O'Connor Hearings*, *supra* note 3, at 160. Her explanation was that she felt free to comment on *Baker v. Carr* because it was "a little unlikely" that the Court was going to "retreat or reconsider [its] basic precepts." *O'Connor Hearings*, *supra* note 3, at 199. By inference, she believed that *Roe v. Wade* was open to retreat or reconsideration.

110. *O'Connor Hearings*, *supra* note 3, at 125.

and federal jurisdiction issues that typically attend attempts to enjoin state proceedings, from abstention to class certification. If an individual has been prosecuted and convicted, the Court may have to rule on numerous criminal procedure and post-conviction review issues such as competency of counsel and preservation of error.

Recent developments have borne out this position. On July 3, 1989, the Supreme Court decided *Webster v. Reproductive Health Services*,[111] which many had thought would be the vehicle for overturning *Roe v. Wade*. The statute at issue in *Webster*, however, hardly tracked the statutes invalidated in *Roe*. Rather, it involved a number of lesser restrictions on abortion, including a declaration that life begins at conception, a ban on abortions and abortion counseling in public facilities, and a requirement of viability testing under certain circumstances.[112] Because the Missouri statute did not criminalize abortion,[113] as had been the case in most jurisdictions prior to *Roe*, it was necessary for the Court to decide the case in the context of its own factual and legal particulars.

The Court did abandon the "rigid trimester analysis" of *Roe v. Wade*,[114] but did not otherwise specifically revisit its holding.[115] With a single possible exception, no justice was interested in overruling *Roe v. Wade*, "no matter what." Although Justice Scalia harshly criticized his colleagues for "finessing" *Roe v. Wade*,[116] Justice O'Connor explained more cogently why the Court could address only those issues that were necessary to the decision in the actual controversy.[117] The point is not whether *Webster* was correctly decided, but rather that all cases are decided in their specific contexts. Consequently, short of an absolute promise to reach a preordained result, a judicial nominee's discussion of legal issues does not, and probably cannot,

111. 109 S. Ct. 3040 (1989).

112. *See id.* at 3043 (plurality opinion).

113. *See id.* at 3045 (plurality opinion).

114. *See id.* at 3047 (plurality opinion).

115. *See id.* at 3048 (plurality opinion).

116. *See id.* at 3051 (Scalia, J., concurring in part and concurring in judgment). In what he clearly intended to be a slashing criticism, Justice Scalia only recapitulated the actual process of common-law judging: "It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb . . . ." *Id.* at 3066.

117. *See id.* at 3049 (O'Connor, J., concurring in part and concurring in judgment). Indeed, the court dismissed one entire issue as moot and declined to reach another for failure to present an actual controversy. *See id.* at 3045, 3047.

presage an opinion that someday will be written.[118]

Just as a judge cannot ignore specific legal, factual, and procedural issues to reach a desired philosophical and moral outcome, an ethical nominee cannot promise to be immune to such facts and argumentation. Any person who makes such a promise has abandoned the willingness to be persuaded or affected by anything other than a pre-existing view. In other words, it would be a promise to decide a certain way, and not a statement of an opinion, that violates Canon 4 by destroying the judge's capacity to be impartial.

## V. The Appearance of Partiality, Part Two: The Problem of Disqualification

Canon 4 is a disciplinary rule. Following my analysis above, it allows a judge to speak on matters concerning the law without fear of censure or punishment, so long as no inflexible promises are made. Potential disciplinary action, however, is not the sole test of propriety. Justice O'Connor argued during her confirmation hearing that a nominee also should refrain from making statements that might lead to disqualification in a future case.[119] Such an obligation would be derived from the justice's duty to be available to do the work of the Court: to sit and decide cases.[120]

The *Code of Judicial Conduct* contains no explicit provision requiring that judges refrain from speech that might lead to disqualification, but it does provide that the "judicial duties of a judge take precedence over all . . . other activities."[121] A voluntary action is questionable if it interferes substantially with the availability of the judge. The need to avoid interference with judging is a theme that runs throughout the *Code*. Canon 4 allows judges to undertake quasi-judicial activities only "subject to the proper performance of judicial duties."[122] Canon 5 limits avocational, civic, charitable, and financial activities to those

118. The exception would occur if a nominee, say Justice Kennedy, had been asked to opine on the constitutionality of the Missouri abortion statute. Even if certiorari had not already been granted in *Webster*, an answer to that question would be a comment on impending litigation.

119. *See O'Connor Hearings*, *supra* note 3, at 58.

120. *See Scalia Hearings*, *supra* note 28, at 44; *O'Connor Hearings*, *supra* note 3, at 58; *see also* E.W. Thode, Reporter's Notes, *supra* note 12, at 74.

121. Model Code of Judicial Conduct Canon 3 (1972).

122. *Id.* at Canon 4 ("A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities . . . .").

that "do not interfere with the performance of judicial duties."[123] Canon 5C(3) requires judges to manage their investments so as to "minimize" the number of cases in which disqualification will be necessary.[124]

In the case of Supreme Court justices, of course, there is an additional need to avoid frequent disqualification. The Supreme Court is the ultimate tribunal on matters that are frequently of urgent public importance. The nation is entitled, where possible, to decisions that are made by a full Court. Moreover, an equally divided Court, which is most likely when one justice is disqualified, is an unsatisfactory result for everyone except the litigant whose victory in the court of appeals is affirmed by the tie.[125]

Justice O'Connor was obviously on firm ground when she expressed her desire to avoid needless disqualification. It does not follow necessarily that a judge is ethically obliged to refrain from answering a senator's questions on the theory that the answer might hypothetically lead to recusal in the future.

It is certainly possible to make too much of the harm attendant to disqualification. In fact, judges—even Supreme Court justices—recuse themselves quite often with no discernible ill effect. Justice Felix Frankfurter, for example, once disqualified himself from a case that challenged the playing of music on city buses in the District of Columbia. A frequent rider of the buses, Justice Frankfurter abhorred the music and therefore believed that he could not fairly sit in judgment on the case.[126] Given the apparent intensity of his feelings, recusal was a simple remedy. An alternative, recusal-averse rule would instead have required the Justice to avoid the voluntary activity (bus riding) that led to the disqualification. Justice Frankfurter could have

123. Canon 5 is titled "A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties." *See id.* at Canons 5A, 5B, 5C.

124. *See id.* at Canon 5C(3).

125. *See* Laird v. Tatum, 409 U.S. 824, 837-38 (1972).

In recent years, the following cases, among others, have been decided by 4-4 votes in the United States Supreme Court: Village of Scarsdale v. McCreary, 471 U.S. 83 (1985) (affirming constitutionality of creche display in public park); Jensen v. Quaring, 472 U.S. 478 (1985) (affirming right of religious objector to be issued a driver's license without submitting to a photograph); Bell v. Lynaugh, 484 U.S. 891 (1987) (denying stay of execution for condemned prisoner); Zbaraz v. Hartigan, 484 U.S. 171 (1987) (affirming injunction against enforcement of state law regulating abortion); and Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1988) (affirming survival of clause of collective bargaining agreement into self-help period following impasse over other issues).

126. *See* Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).

heard the case, but he would be compelled either to purchase an automobile or walk to work.

More recently, the Supreme Court ruled that a district court judge erred by failing to disqualify himself in a case because he sat on the board of trustees of a university whose financial interest would be affected by the outcome.[127] The Court did not suggest that the judge ought to resign from the board to avoid the risk of similar disqualification in the future. To the same effect, the Court held that a justice of the Supreme Court of Alabama should not have participated in a decision involving insurance benefits because the judge himself was concurrently a plaintiff in an identical case pending before a state trial court.[128] The Alabama justice had continued to sit in a case that ultimately would be controlling precedent in his own litigation. While holding that this conflict violated the Due Process Clause,[129] the United States Supreme Court did not even intimate that a justice of Alabama's highest court should refrain from filing a personal lawsuit in the courts of his own state, though in retrospect it is obvious that disqualification may follow from such litigation.

The *Code of Judicial Conduct* contemplates that judges will undertake voluntary activity that might lead to disqualification. Most notably, judges are allowed to hold and manage investments,[130] even though the slightest financial interest in a litigant requires recusal.[131] The federal recusal statute is in accord with this approach,[132] and Congress recognized that this enactment abolished the "duty to sit."[133] It would be possible,

127. *See* Liljeberg v. Health Services Corp., 486 U.S. 847 (1988).

128. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); *see also* Pepsico, Inc. v. McMillan, 764 F.2d 458 (7th Cir. 1985) (judge disqualified because "headhunter" acting on his behalf had contacted both law firms in pending trial regarding possible employment for judge following his imminent retirement from bench; no criticism of judge for seeking employment or using headhunter); Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) (judge erroneously failed to recuse himself in case involving lawyer who was his personal attorney and business associate; no criticism of judge's business dealings); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (judge violated 28 U.S.C. § 455 by not disclosing his joint vacation plans with prosecutor; appellate court specifically limited criticism to lack of disclosure and not to close friendship between judge and United States attorney).

129. U.S. CONST. amend. XIV, § 1.

130. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5C (1972).

131. *See id.* at Canon 3C.

132. *See* 28 U.S.C. § 455(b)(4) and (d)(4) (1974).

133. H.R. 1453, 93d Cong., 1st Sess. 25, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6355 (1974 amendment intended to remove "so-called duty to sit").

though certainly undesirable, to fashion the opposite rule, requiring judges to abjure all investments to preserve their ability to sit and decide. The same may be said of social relationships because they may also require disqualification.[134] Indeed, judges are presumed to be biased in cases involving their children or spouses,[135] relationships that are generally created as the result of some voluntary act. Nonetheless, the remedy for this conflict is to disqualify the judge, not to prohibit romance and procreation.

Indeed, judges who are elevated to a higher court may now be expected to refrain from reviewing their own earlier decisions; Judge Bork[136] and Justice Scalia[137] both took this position during their confirmation hearings. True recusal-aversion, then, would eliminate all lower court judges, and particularly those of long and prolific service, from consideration for the Supreme Court because they would presumably be disqualified in a substantial number of cases.[138] Of course, we do just the opposite, almost invariably promoting judges through the ranks. Occasional recusal is a small price to pay for a knowledgeable and experienced judiciary.

There is, to be sure, a principle of necessity in operation with regard to disqualification. Judges must be allowed to invest, socialize, marry, and be elevated to higher courts. In those circumstances, and others, there is little choice but to opt for the disqualification remedy. The alternative, a cloistered and disconsolate judiciary, would be a poor exchange indeed.[139] Thus, in these areas the risk of future disqualification is greatly discounted due to the predilection we have for personal freedom. The preference for freedom, however, may or may not be the appropriate balance with regard to statements at confirmation

134. *See* United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985) (judge criticized for failing to disclose on record that he had planned joint family vacation with prosecutor and had postponed defendant's sentencing to accommodate vacation); *see also* Lubet, *Judicial Impropriety and Reversible Error*, 3 CRIM. JUSTICE 26 (1988) (arguing that judge's failure to recuse in *Murphy* should have constituted reversible error).

135. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3(1)(c) (1972); 28 U.S.C. § 455.

136. *See Bork Hearings*, *supra* note 2, at 416.

137. *See Scalia Hearings*, *supra* note 28, at 71-73.

138. *See* Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978) (federal district court judge should have disqualified himself from case that he had heard while serving on Virginia Supreme Court).

139. *See* Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379.

hearings.[140]

Justices O'Connor and Scalia obviously believed that it was not necessary to answer all of the senators' questions. Whatever the benefit might have been of providing more complete information to the Judiciary Committee, it apparently did not, in their stated opinions, seem to outweigh the harm of potential disqualification. Many senators, on the other hand, believed that a necessity principle should apply to the questioning of a nominee, even at the risk of disqualification—otherwise they would not have asked questions about legal issues in the first place. Because the nominee alone will eventually decide which questions to answer or avoid, there is little use in attempting to resolve this difference of values. It will be more instructive to consider the universe of confirmation responses that might actually trigger disqualification. Even the most recusal-averse nominee would have to take cognizance of the limits of the disqualification rule.

Notwithstanding the protestations of Justice O'Connor to the contrary,[141] there is nothing approaching a general rule requiring judges to remove themselves from cases where they have previously expressed an opinion on the issues involved. In fact, the limited legal authority on the matter is quite to the contrary. In *Laird v. Tatum*,[142] Justice Rehnquist's participation in a case was challenged on the ground that, when serving in the Justice Department, he had given public testimony supporting the constitutionality of the very program that was at issue in the case.[143] Justice Rehnquist, in what remains the fullest exposition of this issue by a justice of the Supreme Court, concluded that his earlier testimony did not preclude his participation in the case because he would nonetheless be able to reconsider his own predisposition in light of the opposing arguments of counsel.[144] Justice Rehnquist also pointed out that a rule of disqualification based upon one's prior comments could not logically be limited to statements made before Congress. If the appearance of impartiality is damaged by the public expression

140. Regarding the "rule of necessity" as an exception to required disqualification, see Mosk v. Superior Court, 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979); United States v. Will, 449 U.S. 200 (1980).

141. *See O'Connor Hearings*, *supra* note 3, at 58.

142. 409 U.S. 824 (1972).

143. *See id.* at 828.

144. *See id.* at 838-39.

of a view of the law, an internally consistent rule would have to disqualify judges on the basis of their old law review articles, commencement addresses, and even prior judicial opinions.[145]

Since *Laird v. Tatum* it appears that no federal judge has been disqualified solely on the basis of prior public statements. Justice Kennedy, for example, testified that he would not recuse himself in cases involving the Judicial Conduct and Disability Act,[146] even though he had given a "hard hitting" speech in opposition to it.[147] Judges at all levels have been emphatic, nearly to the point of self-righteousness, about their collective ability to be fair to litigants notwithstanding earlier statements or involvements that might seem to favor one side or another.[148] If there is a rule in this area, it is that disqualification is necessary only where the judge's statements were so extreme as to indicate inflexible prejudgment. This standard has only occasionally been met in the context of explicit threats,[149] blanket commitments to particular rulings,[150] or admitted bias in specifically identified cases.[151] It is difficult to see how the

145. *See id.* Justice Rehnquist has since expanded on this view. *See* Rehnquist, *supra* note 93, at 694.

146. 28 U.S.C. §§ 331, 332, 372, 604 (1980).

147. *Kennedy Hearings*, *supra* note 9, at 217.

148. *See, e.g.*, United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985) (judge properly denied disqualification motion notwithstanding his earlier public comments, while serving as a prosecutor, linking the defendant to organized crime); State v. Freeman, 507 F. Supp. 706 (D. Idaho 1981) (Mormon judge denied recusal motion in case involving the proposed Equal Rights Amendment, notwithstanding judge's position as elder in the church and church's announced opposition to the amendment); Commonwealth v. Local Union 542, 388 F. Supp. 155 (E.D. Pa. 1974) (judge denied recusal motion in civil rights case, notwithstanding his long and outspoken association with the civil rights movement).

The courts have not always expressed comparable confidence in the impartiality of administrative adjudicators. *See, e.g.*, Texaco, Inc., v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965) (FTC ruling reversed because chairman had made speech on related matters that indicated prejudgment); *see also* Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives*, 40 FORDHAM L. REV. 101, 102-05 (1971).

149. *See* Roberts v. Commission on Judicial Performance, 33 Cal. 3d 739, 661 P.2d 1064, 190 Cal. Rptr. 910 (1983) (Upon being informed that an attorney intended to appeal an adverse ruling, judge responded, "Buddy boy, you're not going to get away with this. I'm going to see that you lose this case big.").

150. *See* United States v. Thompson, 483 F.2d 527 (3d Cir. 1973) (judge disqualified by reason of announced policy of sentencing all selective service violators to lengthy prison sentences regardless of their individual characteristics). *But see* Lawton v. Tarr, 327 F. Supp. 670 (E.D.N.C. 1971) (judge refused to disqualify himself in selective service cases, while expressing his strong opposition to the war in Vietnam).

151. *See* Roberts v. Bailar, 625 F.2d 125, 127 (6th Cir. 1980) (judge disqualified from Title VII case for stating in pretrial conference: "I know [the lead defendant] and he is an honorable man and I know he would never intentionally discriminate against anybody.").

otherwise reasonable answer to any question at a confirmation hearing could rise to this level.

Congress has implicitly adopted the position that only a small range of public statements should lead to judicial disqualification. In the aftermath of *Laird v. Tatum*, there was considerable unhappiness with Justice Rehnquist's determination that he could sit in review of the constitutionality of a program that he himself had promoted to Congress. In response, Congress amended the federal recusal statute to create an additional ground for disqualification, but only in extremely narrow circumstances. A subsection was added requiring recusal of a federal judge "[w]here he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[152]

The first clause of this section does no more than extend to government lawyers the longstanding rule against sitting as a judge in a matter that one once handled as an attorney.[153] The second clause is new. It mandates recusal only where the judge, when previously serving in governmental employment, "expressed an opinion concerning the merits of the particular case in controversy." The requirement, then, does not apply to statements made while either in private practice or while serving on a lower court,[154] and it covers only opinions given as to the merits of an identifiable case. It manifestly does not apply to general statements concerning the law outside of the context of a specific matter.

It must be concluded that fear of disqualification should play little, if any, role in a nominee's decision whether to answer questions at confirmation hearings. So long as the questions are framed in terms of one's general view of the law and avoid inquiry into pending cases or identifiable proceedings, the answers should not raise the reasonable appearance of partiality and will virtually never require recusal.

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152. 28 U.S.C. § 455(b)(3).

153. 28 U.S.C. § 455(b)(2) requires recusal of a judge "[w]here in private practice he served as lawyer in the matter in controversy . . . ." The comparable provision in the *Code of Judicial Conduct* is found in Canon 3C(1)(b).

154. Note that 28 U.S.C. § 455(b)(2), which applies to judges who were private practitioners, contains no similar provision.

## IV. The Threat to Public Confidence

The final problem raised by the questioning of potential Supreme Court justices is the effect of the nominees' answers on public confidence in the institution itself. If seats on the Supreme Court are perceived as being purchased through the medium of promises to politicians, might not the very legitimacy of the Court suffer?[155] This question extends beyond judicial ethics to address the role of appointed judges in a democratic system.[156]

The *Model Code of Judicial Conduct* contains the following provision:

> A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election: should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or professional issues . . . .[157]

Concerning elected judges, the *Code* is quite specific in its judgment that the expression of any views on disputed issues will damage the integrity of the judiciary. The proscription of the *Code* is not limited to pledges, promises, or similar commitments, but apparently extends to all comments regarding "disputed" legal or political issues. Although this limitation on campaign activity has been criticized,[158] and may well shortchange the sophistication of the voting public, comparable rules have been adopted by a majority of states that fill judicial offices via election.[159]

Should the same restrictions apply to appointed judges? Or does the existence of life tenure, and the concomitant freedom from the need to seek re-election, sufficiently protect judicial independence as to allow at least the discussion of disputed is-

155. *See Scalia Hearings, supra* note 28, at 37 ("I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of a condition to his being confirmed, that he will do this or do that.").

156. *See* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455 (1986); Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv. L. Rev. 1202 (1988); *cf.* Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207 (1988).

157. Model Code of Judicial Conduct Canon 7B(1)(c) (1972).

158. *See* Snyder, *supra* note 156; Chemerinsky, *supra* note 95.

159. *See* Alfini & Brooks, *Ethical Restraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 Ky. L.J. 671, 686-93 (1989).

sues while seeking office? Does the constitutional role of the Senate, in providing its advice and consent to judicial appointments, mandate such discussion? Is the process of Senate confirmation sufficiently dignified to remove the appearance of pandering that might accompany all-out public campaigning for federal judgeships?

Questions such as these were at the heart of the controversy surrounding the Bork nomination. Although these concerns are partly about judicial ethics, they run deeper, to the core of the apportionment of authority among our three branches of federal government.[160] Unlike the problems of actual and apparent partiality, which go to the judging process, the question of public confidence in the judiciary ultimately addresses the political relationship between the government and the people. It is a question of self-governance, not of professional ethics.

If the Senate is constitutionally obliged to inquire into a nominee's views, then no concept of "public confidence," even if embodied in a rule of judicial ethics, ought to be understood to stand in the way.[161] Conversely, if our political structure demands that the Senate refrain from such questioning, then the presence or absence of a specific Canon would seem to be irrelevant. In other words, it is the Constitution, not the *Code of Judicial Conduct*, that governs the relationship among the branches of government and the public.

Perhaps in recognition of this, the United States Judicial Conference deleted the whole of Canon 7 when it adopted the *Code of Judicial Conduct*. On its face, there would be no reason for the appointed federal judiciary to adopt a rule that applies only to judicial elections. On the other hand, it certainly would have been possible for the Judicial Conference to have adapted Canon 7 by applying its terms to confirmation by the Senate. In any event, by omitting the prohibition against the expression of "disputed views," the Judicial Conference appropriately abstained from pronouncing upon the relationship between judicial legitimacy and the confirmation process. That question is left open to the Senate, the nominees, the public, and the Constitution.

160. *See* Black, *supra* note 10; *cf.* Fein, *supra* note 4.
161. *See* 69 F.R.D. 273 (1975).

## VII. Conclusion

Propriety, impropriety, proper, improper, appropriate, inappropriate: These variants on the same root were among the terms most frequently used during the five most recent hearings to confirm nominees to the United States Supreme Court. It is fitting that all of these words derive from the Latin *proprius*, which means "one's own." Without significant exception, the nominees all relied upon self-generated concepts of propriety in answering senators' questions. For every question that was declined by one justice-designate, a comparable question was freely answered by another—if not the very same—nominee.

The *Code of Judicial Conduct* could bring some consistency to this process. The *Code* imposes a straightforward and easily followed ban on all discussion of pending and impending cases. It further prohibits the making of pledges or promises to reach predetermined results. Beyond these limitations, however, the *Code* does not restrain judicial nominees from responding to questions even on disputed and contentious legal issues.

In practice, as we have seen, most nominees have ignored the *Code*, and in so doing they have constrained their testimony far more sharply than the *Code* requires. This exercise of self-restraint may derive from tradition or from an individual's sense of personal rectitude. It does not, however, grow out of any body of law, nor does the practice cohere into a set of determinable legal principles. Rather, as Judge Bork amply demonstrated during the course of his confirmation testimony, ethical judges may talk about the law. Most have chosen not to—but that is another story.